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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 668

AMPLEX OF MARYLAND, INC., PETITIONER

v.

OUTBOARD MARINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Petitioner, a dealer formerly franchised to sell at retail respondent's marine motors, brought this private treble damage antitrust suit under Section 4 of the Clayton Act (15 U.S.C. 15) against respondent to recover for injuries it suffered from respondent's termination of the franchise. The complaint alleged that respondent declined to renew petitioner's franchise because petitioner refused to deal exclusively in respondent's motors (Pet. App. 3).[1] After five days

[1] "Pet. App." refers to the appendix which petitioner filed in the Fourth Circuit, styled "Appellant's Appendix," and which it has filed with this Court. "Pet." refers to the two appendices bound with the petition for certiorari.

of a non-jury trial in the United States District Court for the District of Maryland, during which the court had heard the testimony of five of the approximately 40 witnesses to be called by the plaintiff, the court indicated its doubt that petitioner could prove any antitrust violation and directed that petitioner make an offer of whatever additional proof it expected to introduce. Petitioner made an offer of proof (Pet. App. 99–117), and argument was heard on the legal issues. The court ruled from the bench that, "accepting everything that the plaintiff has proved or proffered in the light most favorable to the plaintiff," it would not establish a violation of the antitrust laws, and it dismissed the complaint (Pet. B–1—B–12).

In the present posture of the case all of the relevant facts in the offer of proof must be taken as true, and all inferences favorable to petitioner must be drawn from such facts, as the district court recognized (Pet. B–1). According to the testimony and the offer of proof, respondent is the leading manufacturer of marine motors in the United States, and had nearly 60 percent of the market during the relevant years.[2] Respondent refused to renew petitioner's franchise because petitioner refused to discontinue selling a competitive brand, Mercury.[3] Respondent then awarded the franchise to another local Mercury dealer, who subsequently ceased to carry the Mercury line and

[2] Pet. A–4; Pet. App. 14, 99, 101.

[3] Pet. A–5; Pet. App. 14, 44–45, 47, 99, 102, 104–105, 116, 117. Respondent contends that it cancelled petitioner because its facilities were squalid (Pet. A–6), but the offer of proof is to the contrary (Pet. App. 103–109, 115).

dealt exclusively in respondent's motors.[4] As a result of the loss of respondent's franchise, petitioner's business failed.[5]

Respondent has tried to persuade dealers to deal exclusively in its motors and has at times threatened dealers with loss of franchise if they failed to do so.[6] Dealers have acquiesced in respondent's exclusivity demands.[7] Of the approximately 100 dealers in the Middle Atlantic sales territory where petitioner was located, all but 8 dealt exclusively in respondent's motors; the few exceptions were in rural areas where substitute dealers were hard to find.[8] Market conditions are such that a marine motor dealership probably cannot operate successfully without a major-brand franchise.[9]

The Court of Appeals for the Fourth Circuit affirmed the dismissal of the complaint (Pet. A–1—A–9), on the ground that a refusal to deal with a distributor who will not agree to an unlawful exclusivity arrangement does not violate Section 3 of the Clayton Act (15 U.S.C. 14) or Section 1 of the Sherman Act (15 U.S.C. 1).[10]

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[4] Pet. App. 147–150.

[5] Pet. App. 102, 106, 113, 115–116.

[6] Pet. App. 63, 65, 67, 69, 70, 71, 73, 77, 109–110, 112.

[7] Pet. App. 66, 67, 109, 110, 113.

[8] Pet. App. 94–96, 109.

[9] Pet. App. 102, 106, 110, 113, 115–117.

[10] The court of appeals pointed out that, although petitioner had not invoked Section 3 of the Clayton Act and had relied on Section 1 of the Sherman Act instead, nonetheless Section 3 "approaches the plaintiff's grievances more closely than does the statute pleaded" (Pet. A–6, A–7). We think that the court of appeals correctly considered the Section 3 issue notwithstand-

INTEREST OF THE UNITED STATES

In view of the variety and scale of the nation's commerce, it would be virtually impossible for the government to discover, investigate and proceed against every scheme proscribed by the antitrust laws. Private treble damage suits serve the important public purpose of supplementing the government's enforcement activities, and thus play a major role in obtaining compliance with those laws. It is therefore a matter of concern to the United States when private enforcement of the antitrust laws has proven ineffective in any significant respect. Such a situation has developed with respect to the proscription of exclusive dealing arrangements.

Under the existing lower-court case law, a distributor who has been cut off by his supplier for refusing to deal exclusively in the supplier's products generally has been denied recovery under the antitrust laws for his resulting damage, on the theory that a refusal to deal involves no unlawful "agreement" with, or consummated sale to, the cancelled dealer.[11] Since the tacit acquiescence of distributors in exclusive dealing arrangements can frequently be obtained through threats of refusal to deal—especially if an occasional intractable dealer is cut off as an example to others—

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ing the failure of the complaint to refer to that Act. See *Conley* v. *Gibson*, 355 U.S. 41, 47–48; *Missouri, Kansas & Tex. Ry.* v. *Wulf*, 226 U.S. 570, 576; *United States* v. *Missouri-Kansas-Tex. R. Co.*, 278 F. 2d 474 (C.A. 10); *Dioguardi* v. *Durning*, 139 F. 2d 774 (C.A. 2); *Lennerth* v. *Mendenhall*, 234 F. Supp. 59 (N.D. Ohio); F.R. Civ. P. 8(a).

[11] See the cases cited *infra*, pp. 10–11.

a serious loophole has developed in antitrust enforcement.

From the supplier's point of view, reliance on threats of refusal to deal avoids the risk of inserting express exclusive dealing clauses in franchise agreements. Such a clause might prove unenforceable in an action on the contract and, indeed, might constitute damning evidence in an antitrust action. Moreover, the lower-court rule involved in this case creates an insurmountable obstacle to the recovery of damages by dealers who are cast out because they refuse to deal exclusively. Paradoxically, the rule may put the cancelled dealer who has refused to agree to violate the law in a worse position than if he had agreed to an illegal exclusive dealing arrangement embodied in a franchise contract. This result is particularly unfortunate for antitrust enforcement because it is precisely the cancelled dealer who is likely to have both the motive to litigate and the evidence needed to prevail. Experience indicates that the dealer who has retained his franchise may be reluctant to endanger his source of supply, while competitors of the supplier, who have been injured by the cutting off of access to the outlets that handle the supplier's products exclusively, may lack the necessary evidence.

In affirming the dismissal of the complaint in the present case, the court of appeals applied the prevailing lower court rule that bars a dealer from recovering under the antitrust laws against a supplier who cancels his franchise because he will not accede to an unlawful exclusive dealing arrangement in which

other dealers have acquiesced. The validity of the rule thus is directly presented. We believe, for the reasons set forth below, that the rule is unsound and should be rejected. Review by this Court is appropriate because of the adverse impact the rule has upon antitrust enforcement, particularly in view of the ever-increasing use of franchise dealerships in retail distribution.[12]

DISCUSSION

1. The decision below rests on the proposition that Section 3 of the Clayton Act and Section 1 of the Sherman Act are "directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding." Pet. A–8, quoting *McElhenny Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332, 338 (C.A. 4). Finding that respondent refused to deal with petitioner, the court concluded that the requisite executed agreement was lacking and affirmed the dismissal of petitioner's complaint. We submit that the court's analysis stopped much too soon.

Petitioner proved or offered to prove that respondent has tried to persuade its dealers to refrain from

[12] The petition also presents the preliminary procedural question whether the court of appeals erred in refusing to treat as true, on what amounts to a motion to dismiss, the facts set out in petitioner's offer of proof. Since we think that this ruling was plainly erroneous, we do not discuss it, but accept as proved what petitioner offered to prove.

The petition also raises questions under Section 2 of the Sherman Act and urges that petitioner made out a case of unlawful monopolization. We express no view on that aspect of the case.

carrying its competitors' motors, that respondent has threatened dealers with the termination of their franchises for failure to deal exclusively with respondent, and that most dealers do in fact deal with respondent on an exclusive basis. See p. 3, *supra*. We believe that such proof would justify a finding that—in the language of Section 3 of the Clayton Act—respondent sold its motors "on the condition, agreement, or understanding that the * * * purchaser thereof shall not * * * deal in the goods, wares, [or] merchandise * * * of a competitor" (15 U.S.C 14). Moreover, although the court below did not reach the question, we think that the record shows that the respondent's exclusive dealing produced a sufficiently serious foreclosure of outlets to respondent's competitors to establish the requisite anticompetitive effect under either Section 1 of the Sherman Act or Section 3 of the Clayton Act.[13] See *United States* v. *Philadelphia*

[13] The court below did not reach the question of the anticompetitive effect of respondent's exclusive dealing arrangements and that question is not before this Court. Ten years ago, the Federal Trade Commission held that the respondent's exclusive dealing arrangements had a significantly adverse effect upon competition because they foreclosed competing manufacturers from a significant share of the market. In *Outboard, Marine & Mfg. Co.*, 52 F.T.C. 1553, as here, respondent Outboard, the dominant small-boat motor manufacturer (*id.* at 1554), was charged with not allowing its dealers to carry other brands of marine motors. Since dealers generally prefer to carry a full line of motor sizes (*id.* at 1569, 1572), those competitors of Outboard which manufactured only partial lines of motors were unable to secure access to many first-class outlets (*ibid.*). The Commission's examiner found that a significant capital outlay was required to produce each motor size (*id.* at 1576); that, had respondent not foreclosed so many outlets to

National Bank, 374 U.S. 321, 365–366; *Standard Oil Company* v. *United States,* 337 U.S. 293. Finally, petitioner's evidence showed that its franchise was cancelled because it carried a competitive line of motors.

In these circumstances, respondent's refusal to deal with petitioner appears to serve an integral function in maintaining an unlawful system of exclusive dealing and of preserving the tacit acquiescence of its other dealers in that system. The exclusive dealing arrangements and the refusal to deal are thus merely two aspects of the same illegal design.

Section 4 of the Clayton Act permits any person "injured in his business or property by reason of anything forbidden in the antitrust laws" to maintain a private treble damage action. If petitioner was injured by the refusal to deal—as it alleges—such injury was "by reason of [something] forbidden in the antitrust laws," namely, respondent's illegal exclusive-dealing arrangements. These arrangements cannot properly be viewed in isolation from the

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competitors, competitors with a partial range of motor sizes would have been better able to enter the market; and that respondent's exclusive dealing policy forced competitors either to produce a full line or else to fall back on second-rate distributors—thus imposing on competitors the choice between a large capital outlay or high distribution costs. The Commission affirmed the initial decision, concluding that "the trial record fully supports a conclusion of probable injury to competition through the foreclosure of competitors from a substantial and highly desirable portion of the outboard motor market" (*id.* at 1579).

Petitioner's proof and offer of proof in the present case would justify similar conclusions to those made by the Federal Trade Commission.

refusal to deal with petitioner. They are inextricably interrelated. Were it not for the fact that a significant number of franchisees were willing to accede to respondent's exclusive dealing arrangements, respondent would not have been able to refuse to deal with a recalcitrant distributor. Furthermore, the termination of petitioner's franchise necessarily indicated to other dealers that respondent's threats of cancellation for handling competing products were to be taken seriously, and thus tended to insure continued acquiescence in respondent's exclusive dealing arrangements.

The basic error of the court of appeals was in failing to recognize these economic realities, and in rejecting petitioner's claim for want of an unlawful agreement between respondent and petitioner while ignoring the tacit agreements between respondents and its other dealers which made possible the refusal to deal with petitioner.

2. This Court stated the general principles applicable to refusals to deal in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 625:

> Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, * * * different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though "neither absolute nor exempt from regulation." *Lorain Journal* v. *United States*, 342 U.S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or con-

> ceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. [Citations and footnote omitted.] [14]

The government's right to antitrust relief, and the cancelled dealer's right to recover, is well established in cases of concerted refusals to deal, as where suppliers act together or at the behest of rival dealers. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457. The Court has also sustained the government's right to relief under the Sherman Act against a supplier who uses an announced policy of refusal to deal as a means of putting together a combination to maintain resale prices. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.[15] But this Court has not yet expressly passed upon the question, presented here, of the cancelled dealer's right to relief against such a supplier—*i.e.*, one who uses refusal to deal as a means to secure compliance with an anticompetitive program embodied in tacit agreements with acquiescent dealers.

A substantial number of lower courts, however, have held that the cancelled dealer cannot recover. The leading case is *Nelson Radio & Supply Co.* v. *Moto-*

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[14] Accord, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 469.

[15] A district court has held that the government is entitled to relief under Section 3 of the Clayton Act where a supplier used refusal to deal as a means of establishing an exclusive dealing program among a series of dealers who separately acquiesced in the program. *United States* v. *Sun Oil Co.*, 176 F. Supp. 715 (E.D. Pa.).

rola, Inc., 200 F. 2d 911 (C.A. 5), certiorari denied, 345 U.S. 925. Accord, *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (C.A. 5); *Leo J. Meyberg Co.* v. *Eureka Williams Corp.*, 215 F. 2d 100 (C.A. 9), certiorari denied, 348 U.S. 875; *Mackey* v. *Sears, Roebuck & Co.*, 237 F. 2d 869 (C.A. 7); *Allied Equipment Co.* v. *Weber Engineered Products, Inc.*, 237 F. 2d 879 (C.A. 4); *Associated Beverages Co.* v. *P. Ballantine & Sons*, 287 F. 2d 261 (C.A. 5); *Quinn* v. *Mobil Oil Co.*, 375 F. 2d 273 (C.A. 1); see *Simpson* v. *Union Oil Co.*, 162 F. Supp. 746 (N.D. Calif.), reversed on other grounds, 377 U.S. 13; see, contra, *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (C.A. 9). Under this line of authority, which the court below followed, the dealer disciplined by cancellation or non-renewal of his franchise when he refuses to agree to an arrangement in violation of the antitrust laws has no remedy, because Section 3 of the Clayton Act and Section 1 of the Sherman Act prohibit only executed sales or agreements on restrictive conditions—and not refusals to deal.

To be sure, these decisions recognize that the defendant supplier has made sales to and agreements with dealers other than the plaintiff. But those sales and agreements, even though they may violate the antitrust laws, are deemed immaterial on the ground that "it is the absence of a contract with the plaintiff, not the presence of the agreements with distributors in other parts of the country, of which the plaintiff must complain" (*Nelson, supra*, 200 F. 2d at 915). Thus the court below quoted one of its earlier opinions (*McElhenny Co.* v. *Western Auto Co.*, 269 F. 2d

332, 337–338) for the proposition that a seller is not "liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement" (Pet. A–7—A–8). The result is to deny redress to the dealer who has suffered injury for his unwillingness to fall in line by acceding to an unlawful program. Such an anomalous result is not justified by the broad language of Section 4 of the Clayton Act and would defeat the objectives of Congress in creating the private antitrust remedy.

We urge, therefore, that a refusal to deal is actionable under Section 4 of the Clayton Act, which simply requires that the injury be "by reason of anything forbidden in the antitrust laws," when it is used to secure, or in an attempt to secure, agreement to a proposal which, if acceded to, would (1) comprise one of a set of contracts in unreasonable restraint of trade, or (2) constitute one of a number of sales agreements made on condition or understanding of unlawful exclusive dealing. To the extent, if any, that such a ruling may further curtail "the limited dispensation" conferred on refusals to deal under the doctrine of *United States* v. *Colgate & Co.*, 250 U.S. 300, as already qualified in *United States* v. *Parke Davis & Co.*, 362 U.S. 29, we would urge that such curtailment is required for the proper enforcement of the antitrust laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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